IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 95 OF 2006

SHRI SHABA ZULO SHET ALIAS SANGTU SHET (SINCE DEC.) THROUGH L.RS. ... Appellants

Versus

SHRI ULHAS KRISHNA FONDEKAR AND 2 ORS., ... Respondents

Mr. M. S. Usgaonkar, Senior Advocate with Mr. A. Borkar, Advocate for the appellants.

Mr. S. S. Kantak and Ms. R. Chodankar, Advocates for the respondent No.1.

Mr. S. Samant, Advocate for the respondents No.2 & 3.

Coram:- S.A.BOBDE, J.

Date:- 22nd March, 2007

P.C.

This second appeal is preferred by the original defendants. The respondent No.1 having purchased the suit property from the LRs. of Laximan Naik Bolnekar, filed the suit for injunction to restrain the appellants from obstructing the plaintiff's enjoyment of the suit property.

2. The respondent No.1 purchased the suit property from Laximan Ramchandra Bolnekar and Laxmi Naik Bolnekar who are the descendants of Kashi Naik Bolnekar, who was married to Laximan Naik Bolnekar. The property belonged to the parents of Kashi Naik Bolnekar i.e. Essu Rama Naik Zoino and Satyabhama Naik Zoino. The latter had two children viz. Bayu Zulo Shet and Kashi Naik Bolnekar, as mentioned earlier. The defendants are the heirs of Bayu Zulo Shet. The relationships are set out in the genealogical tree reproduced by the trial Court in para 12 of its Judgment.

3. The defendants' case is that Laximan Naik Bolnekar who was married to Kashi Naik Bolnekar died before his father-in-law Essu Rama Naik Zoino and, therefore, he did not acquire any share in the property. On the other hand, the property reverted to the sister of Kashi Naik Bolnekar upon the death of the latter and thereafter, it came to them (the defendants) by succession. Therefore, the heirs of Laximan could not have conveyed any title to the respondents since they themselves got none.

4. Thus, the important point was whether Laximan Naik Bolnekar died after Essu Rama Zoino or before. The trial Court framed various issues, the relevant issues are as follows :

(1) Whether the plaintiff proves that he is the owner of the suit property having acquired rights in the suit property by way of purchase from Ramchandra Bolnekar and his wife, Laximan Bolnekar and Mrs. Laximi Gaunkar and her husband ?

(2) Whether the plaintiff proves that he is enjoying the suit property as co-owner ?

(3) Whether the defendant Nos. 1 and 2 prove that Ramchandra Bolnekar and his wife, Laximan Bolnekar and Laximi Vishnu Naik Gaunkar and her husband had no right in the suit property ?

(4) Whether the defendant nos. 1 and 2 prove that the plaintiff has no right in the suit property ?

5. While answering the issues, the trial Court came to the conclusion that the plaintiff acquired rights in the property having purchased it from Ramchandra Bolnekar and his wife, Laximan Bolnekar

and Mrs. Laximi Gaunkar. With reference to the issue related to the defence raised by the defendants, the trial Court observed that the defendants failed to establish that the vendors of the plaintiff had no right in the suit property. While answering this issue, the trial Court considered the question whether Laximan Naik Bolnekar died before his father-in-law Essu. Having cast the burden of proving this issue on the defendants, the trial Court scanned the oral as well as documentary evidence and vide paras 22 and 23 came to the conclusion that the defendants failed to prove that Laximan had predeceased Essu. As a result, the trial Court came to the conclusion that the property was inherited by the heirs of Laximan and thereupon sold it to the plaintiff who has acquired right in the property. The trial Court, therefore, granted the injunction.

6. The appellate Court considered the same question and agreed with the trial Court after framing the following points for determination :

(i) Had the learned Civil Judge erred in holding that the plaintiff had proved that he is the co-owner of the suit property by virtue of the two sale deeds of 16.12.1982 and 16.6.84 ?

(ii) Had the learned Civil Judge erred in holding that the defendants have failed to prove that the plaintiff has no right in the suit property ?

(iii)Had the learned Civil Judge erred in decreeing the suit ?

The appellate Court also considered the evidence and vide paras 29, 39, 40, 41, 42 and 43 came to the conclusion that Laximan did not predecease Essu.

7. In passing, the appellate Court and the trial Court, also considered the decision of the learned District Judge in Land Acquisition Case No.64/1987, in which the Court while deciding the reference under Section 30 of the Land Acquisition Act came to the conclusion that the share of the property in question, had devolved on the vendors of the plaintiff. It is an admitted fact that a first appeal against the Judgment and Award of the learned District Judge is pending in this Court.

8. Mr. Usgaonkar, the learned Senior Counsel for the appellants submitted that the Judgments of the two Courts below suffer from gross error of law in coming to the conclusion that Laximan did not predecease his father-in-law, Essu. According to the learned Counsel, the trial Court came to the conclusion that the defendants had not proved that Laximan did not predecease his father-in-law. According to the learned Counsel this was not sufficient and the issue was wrongly decided by the trial Court and wrongly upheld by the appellate Court. I do not see any merit in this contention in view of the fact that in this case, it is the defendants who had alleged that Laximan had not inherited the property because he predeceased his father-in-law. It was, therefore, necessary for them to discharge the burden and prove that fact. Having failed to do so, it is not permissible for them to resist the decree. Moreover, it is obvious that this issue does not give rise to any substantial question of law. The question is purely one of fact i.e. whether Laximan Naik Bolnekar predeceased his father-in-law, Essu or not.

9. It was next contended by Mr. Usgaonkar, the learned Counsel for the appellants that the first appeal against the Judgment and Award of the learned District Judge in the land acquisition proceeding is pending and, therefore, there is no finality to the findings of the learned District Judge in the land acquisition reference that Laximan and his heirs substantially inherited the property and passed on title to the present plaintiff. It does not appear that that is a sufficient reason to warrant admission of this

second appeal and that will not, in any case, give rise to any substantial question of law. Admittedly, no application for stay of this suit from which the second appeal arises, was ever made by the appellants. Moreover, there would have been some merit in the submission on behalf of the appellants if the Judgment of the Court below was based purely on the decision of the learned District Judge in the land acquisition reference. That is not so. The Judgment is based on appreciation of the evidence adduced by the parties substantially on the question whether Laximan predeceased his father-in-law, Essu or not.

10. In this view of the matter, I see no merit in the second appeal, which is, hereby, dismissed.

S.A.BOBDE, J.

ssm.